Supreme Court, U. S.
FILED
MAR 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976.

## No. 76-1033.

JOHN EVANS, Trustee in Bankruptcy for
HEMPFIELD STORES, INC., a Bankrupt,
*Petitioner,*

*v.*

S. S. KRESGE COMPANY, a Foreign Corporation,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HENRY T. REATH,
MICHAEL M. BAYLSON,
RICHARD M. ABRAMS,
DUANE, MORRIS & HECKSCHER,
1600 Land Title Building,
Philadelphia, Pennsylvania. 19110
*Attorneys for Respondent.*

JAMES C. TUTTLE,
Kresge International Headquarters,
Troy, Michigan,
and
ANDREW L. WEIL, JR.,
CLELAND, HURTT, WITT AND WEIL,
Pittsburgh, Pennsylvania,
*Of Counsel.*

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

## TABLE OF CONTENTS.


| | Page |
|---|---|
| COUNTERSTATEMENT OF QUESTIONS PRESENTED | 1 |
| COUNTERSTATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 7 |
| A. The Commercial Relationship in This Case Is So Unique That It Presents No Questions of National Importance, and Can Not Be a Precedent for Other Cases; and the Issues Presented Do Not Satisfy the Criteria for Certiorari Under Rule 19(1)(b) | 7 |
| B. Certiorari Should Also Be Denied Because Hempfield's Petition Ignores the Findings Below That Kresge and Hempfield Were Not Competitors, and Thus There Was No Restraint of Trade | 9 |
| C. There Was No Basis in the Record to Declare the License Agreement Provisions Per Se Illegal | 12 |
| D. This Court Should Not Review This Case Because the Limited Restraints Agreed to by Kresge and Hempfield Are Lawful Under the Ancillary Restraints Doctrine | 13 |
| E. The Lower Courts Did Not Err in Ruling on the Scope of Discovery | 16 |
| CONCLUSION | 18 |

## TABLE OF CITATIONS.


| Cases: | Page |
|---|---|
| Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 45 U. S. L. W. 4138 (1/25/77) | 17 |
| Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F. 2d 358 (2d Cir. 1959) | 14 |
| Denison Mattress Factory v. Spring-Air Co., 308 F. 2d 403 (5th Cir. 1962) | 14 |
| E. I. duPont DeNemours & Co. v. Celanese Corp. of America, 167 F. 2d 487 (Ct. of Cust. and Pat. Appeals 1948) | 14 |
| Hospital Building Co. v. Trustees of Rex Hospital, 96 S. Ct. 1848 (1976) | 6 |
| Knuth v. Erie-Crawford Dairy Cooperative Assn., 326 F. Supp. 48, 53, aff'd on this point, 463 F. 2d 470 (3d Cir. 1972), cert. denied, 410 U. S. 913 | 10 |
| People ex rel. Scott v. Convenient Food Mart, Inc., 211 Ill. App. 3d 97, 315 N. E. 2d 124 (App. Ct. Ill. 1974) | 8, 15 |
| Rice v. Sioux City Cemetery, 349 U. S. 70 (1955) | 9 |
| Savon Gas Stations No. Six v. Shell Oil Co., 309 F. 2d 306 (4th Cir. 1962), cert. denied 372 U. S. 911 (1962) | 14, 15 |
| Syntex Laboratories, Inc. v. Norwich Pharmacal Co., 1970 CCH Trade Cases ¶ 73,372 (S. D. N. Y. 1970) | 15 |
| United States v. Columbia Pictures Corp., 169 F. Supp. 888 (S. D. N. Y. 1959) | 10 |
| United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S. D. N. Y. 1960) | 13, 16 |
| United States v. Topco Associates, 405 U. S. 596 (1972) | 12, 13 |
| White Motor Co. v. United States, 372 U. S. 253 (1963) | 13 |


## COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Should this Court Grant Certiorari In this Case When the Commercial Relationship between the Parties and Facts are So Unique that None of the Criteria Under Rule 19(1)(b) of this Court Are Met?

2. Should this Court Grant Certiorari in this Antitrust Case When Petitioner Ignores Findings Below that Petitioner and Respondent Were Not Competitors, and Thus, There Was No Restraint of Trade by Virtue of License Agreements Entered Into by Petitioner and Respondent?

3. Should this Court Grant Certiorari Where Petitioner Urged the Lower Courts to Hold Certain Provisions of License Agreements to be *Per Se* Illegal, but the Lower Courts Held There Was No Basis in the Record for So Holding?

4. Should this Court Grant Certiorari Where the Provisions of the License Agreements are Lawful under the Ancillary Restraints Doctrine?

5. Should this Court Grant Certiorari to Review Rulings of the Lower Courts on the Proper Scope of Discovery?

## COUNTERSTATEMENT OF THE CASE.

The issue in this case is whether the Court of Appeals erred in affirming Summary Judgment for Respondent in an antitrust case where both parties asked the District Court to rule on the validity of License Agreements whereby Petitioner operated a food supermarket as part of a unique merchandising concept under Respondent's registered "K mart" name. Both parties agreed there were no issues of fact and the primary issue now presented is whether the License Agreements were *per se* illegal.

Both the District Court and the Court of Appeals have correctly stated the facts (see Petition pp. 3a-6a, 27a-33a). The following summary will introduce the Arguments below.

Respondent ("Kresge"), long successful in operating low cost variety stores, decided in the early 1960's to expand the scope of its business operations. Under its federally registered service mark "K mart" Kresge developed broader range department stores whose emphasis was on a low margin, high discount, low cost, one-stop retailing service that would meet all its customers' day-to-day needs, including food, under one roof.

Since Kresge had no prior experience in food merchandising, it decided to license independent food supermarket operators to use the "K mart" name and operate under the same roof with the Kresge-operated department store. Petitioner ("Hempfield" d/b/a "K mart Foods") was one of these supermarket operators.

The key to the entire operation was that the whole store should appear to be one business, rather than two separate businesses (supermarket and department store).

This arrangement has been variously described as a licensing agreement, a *de facto* partnership by the District



Court (pp. 67a-69a) and as a "concession" by the Court of Appeals (pp. 14a-15a).

Both Courts suggested that this unique relationship probably could not be pidgeonholed into any one category, but rather had elements of all of these arrangements. Kresge would sell department store general merchandise items, and the supermarket would sell food items, all under one roof. Both would benefit from each other's customers, and the food supermarket operator would benefit from the K mart advertising, service mark, public image and reputation as a discount, low cost, high quality merchandiser.

As a part of this unique joint enterprise agreement, both participants recognized that their efforts would have to be co-ordinated. As the Court of Appeals recognized at p. 17a, "both Kresge and Hempfield presented a common front under a common name to the customer." With Kresge running the department store part, and Hempfield running the supermarket part, there had to be a general definition and coordination of who would sell which goods, and how to price those few goods sold in common by both departments, such as health and beauty aids (which products amounted to not more than 2-5% of Hempfield's sales) (p. 5a).

All the signatories to the initial License Agreements between Hempfield and Kresge agreed, for the mutual benefit of both stores, that those limited items sold in both parts—under the same roof and same K mart name—would be sold at the same price. Otherwise, there would be customer confusion and total bewilderment if the same goods were sold at different prices in what was one K mart Discount Department store. Furthermore, Kresge's valuable high discount-low price K mart image would be seriously eroded in consumers' eyes if the food operator charged a *higher price* for non-food items sold in common.

Additionally, K mart wanted to be sure, again to protect its discount image and to avoid penalizing its valued customers, that Hempfield food market prices on food items were competitive with other food stores in the marketing area.

It was for all the above described reasons that in 1963 and 1964, Kresge and the original owners of Hempfield's corporate predecessor ("Skat-Zap"), entered into the specific License Agreements for two food supermarkets to be operated as part of two K mart stores in the Pittsburgh, Pennsylvania area.

The License Agreements, in order to preserve and protect the registered K mart trade name identification with the widely-advertised "discount" image of quality goods and competitive prices, also stated that Hempfield had to respect Kresge's K mart standards for the conduct of business, such as courteous service, fire prevention, and clean premises.

Under the agreements, the licensee was authorized to *select and sell* all food items and categories of non-food items commonly sold in supermarkets.

The essential points in the record that support the above discussion of the mutually agreed to reasons for, and acceptance of, this unique relationship between Kresge and Hempfield appear in the uncontradicted affidavit of Frank J. Zappala, one of the three original owners of Hempfield's corporate predecessor.[1] This affidavit, which

1. The important points covered in the Zappala affidavit, as corroborated by the affidavit of Ralph Phelps, then Kresge general counsel, are:

(a) Kresge and Hempfield both wanted the K mart program to be a competitively priced, discount retail operation.

(b) The two stores were designed to appear to the public as a single unit, to encourage "one stop" shopping, although actually coordinated under separate management.

(c) Kresge did not at any time sell any goods or services to the Hempfield supermarkets—it only licensed Hempfield to



was not challenged or refuted, was heavily relied on by the Court of Appeals and the District Court (pp. 20a-23a, 74a-75a), but is not even mentioned in the petition for certiorari.

After approximately three years of very active discovery, including full exchange of documents, answers to numerous interrogatories and numerous depositions, Kresge moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, asserting three separate and independent legal bases for its Motion:

1. No subject matter jurisdiction.

2. The written agreements on which Hempfield sued were lawful.

3. Hempfield was barred from claiming that the agreements violate section 1 of the Sherman Act.

Hempfield, conceding that there were no factual or procedural barriers to summary judgment, also moved for "partial summary judgment" that subject matter jurisdiction existed and that the agreements were *per se* unlawful. Thus, both parties consented to the Court deciding, on cross summary judgment motions, the validity of the written agreements on which Hempfield's claim was based.

The District Court granted Kresge's Motion for Summary Judgment holding that subject matter jurisdiction did not exist and that the License Agreements did not violate Section 1 of the Sherman Act.

The Court of Appeals agreed that there were no issues of material fact in dispute, and affirmed the judgment of

1. (Cont'd.)
use the K mart registered trade name. Hempfield was free to purchase its goods from whatever source it desired.

(d) The K mart department store, operated by Kresge, and the supermarket, operated by Hempfield, were not to compete with each other—otherwise, the entire program would be a nullity.

the District Court. The Court of Appeals affirmed on the substantive issue only, holding that subject matter jurisdiction existed.[2]

Kresge believes the District Court opinion was correct on all points and the Court of Appeals' opinion was correct in sustaining summary judgment on the ground that the Sherman Act was not violated.

2. Kresge believes the jurisdictional holding by the Court of Appeals misapplied this Court's recent decision in *Hospital Building Co. v. Trustees of Rex Hospital* (pp. 9a-10a), reported in 96 S. Ct. 1848 (1976). Decided after the oral argument in the Court of Appeals, its effect on the facts of this case was never argued or fully briefed. However, Kresge has not requested this Court to review this aspect of the case.



## REASONS FOR DENYING THE WRIT.

### A. The Commercial Relationship in This Case Is So Unique That It Presents No Questions of National Importance, and Cannot Be a Precedent for Other Cases; and the Issues Presented Do Not Satisfy the Criteria for Certiorari Under Rule 19(1)(b).

The present case is a private suit involving unique facts in a situation which both courts below recognized as *sui generis*.[3] The Court of Appeals emphasized the unique facts of this case, and the absence of any prior judicial decision evaluating a similar business arrangement (p. 14a). Accordingly it presents no broad questions of national antitrust policy, nor does it have any precedential value for other parties.

Rule 19(1)(b) of this Court's Rules sets forth the considerations governing review on certiorari of a case from a court of appeals:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable

3. The record also reflects changes in the license agreements used by Kresge since the Hempfield agreements were signed in 1963 and 1964. Kresge's agreements after 1969 did not contain the identical pricing provisions complained of by Hempfield. No other licensee has sued Kresge under Section 1 of the Sherman Act. These circumstances emphasize even further the lack of precedential value to the present case; and therefore, an opinion by this Court on these facts is not important for guidance of lower courts in their interpretation of Section 1 of the Sherman Act.

decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Considering these criteria in order:

1. Hempfield points to no decision from this Court or another Court of Appeals in conflict with the present decision, nor can it, since the present situation is unique; [4]

2. There is no question of state or territorial law in this case;

3. As stated above there is no "important question of federal law which has not been, but should be, settled by this court" since the unique facts would have no precedential value for other antitrust cases;

4. Indeed, the only case even arguably similar to the present case is *People ex rel. Scott v. Convenient Food Mart, Inc.*, 21 Ill. App. 3d 97, 315 N. E. 2d 124 (App. Ct. Ill. 1974). In that decision, an Illinois Appellate Court ruling under the state antitrust act, using the federal "rule of reason", sustained a much more restrictive pricing policy than in the instant case, and upheld the importance of trade mark identification of a "way" of doing business, as well as for identification of particular goods. In both the Illinois case and the instant case, the restrictions were correctly sustained as part of a franchisor's obligation to maintain quality control. The Illinois Court cited many of the federal decisions discussing "quality control" that Kresge relied on in this case, and concluded (315 N. E. 2d at 132):

> While franchisors cannot violate antitrust laws any more than anyone else, franchisors are unique in that some control must be exercised over their franchisees in order to maintain quality and standards of the franchise operation. In situations where identification with a franchisor's trade mark is the basis of restrictions on a franchisee, the imposition may be justified on the ground that the holder of the trade mark must control the quality of the seller's goods or run the risk of giving up his rights in the mark. . . .



4. It is clear from a reading of the two opinions below that both courts gave careful and painstaking deliberation to this case and did not depart "from the accepted and usual course of judicial proceedings . . . [so] as to call for an exercise of this court's power of supervision."

Therefore, certiorari should be denied. See *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955).

**B. Certiorari Should Also Be Denied Because Hempfield's Petition Ignores the Findings Below That Kresge and Hempfield Were Not Competitors, and Thus There Was No Restraint of Trade.**

Hempfield's first argument attempts to bring the present case within #1 above, claiming that the judgment below conflicts with Supreme Court decisions that the intentions of the parties will not save a price-fixing agreement from being *per se* unlawful. The lower Courts did not so hold. The two lower courts did not sustain the Kresge-Hempfield arrangement merely on the basis of the parties' intention, but rather, on the basis that there was, in fact and law, no competition, no "price-fixing" and further, no restraint on trade (pp. 16a-18a, 65a-67a).[5] It is anomalous to contend that *de facto* partners, as were Kresge and Hempfield, were also competitors, and it is contrary to the uncontradicted affidavits and other evidence of record.

Hempfield erroneously persists in characterizing the License Agreements as "naked price-fixing." The Court

5. The District Court stated, "We find that Hempfield and Kresge were not competitors" p. 74a. The Court of Appeals held "Here, the relationship established by the parties demonstrate to our satisfaction that the necessary element of competition is lacking" p. 16a. Thus, this case does not fall into the "horizontal" category of per se arrangements, and, because there was no supply of goods by Kresge to Hempfield, it is not a "vertical" case.

of Appeals and District Court held that the license provisions were designed to and did help Kresge and Hempfield together form a unique merchandising concept to more effectively compete against other department stores and supermarkets, and thus serve a legitimate business purpose, and the consuming public.

Accordingly, the two courts below were correct in holding that Kresge's identical pricing policy as to the very small volume of common non-food items sold by Kresge and Hempfield was lawful and reasonable because Kresge and Hempfield were not competitors. See also *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888 (S. D. N. Y. 1959); *Knuth v. Erie-Crawford Dairy Cooperative Assn.*, 326 F. Supp. 48, 53, aff'd on this point, 463 F. 2d 470 (3d Cir. 1972), cert. denied, 410 U. S. 913.

Furthermore, the identical pricing policy itself was reasonable because Kresge had no market dominance whatever and could not adversely affect the market prices of the few non-food goods sold subject to this policy. The record showed the many other stores in the Hempfield area selling supermarket-type goods. Furthermore, it was necessary to the joint enterprise that both participants have a consistent pricing policy to avoid customer confusion and disenchantment. Otherwise, customers would be confronted with the anomaly of certain non-food goods being priced one way at one counter and another way at a nearby counter in what was designed to appear to be the same store.

Just as the identical pricing policy was reasonable as to common non-food items, so the competitive pricing policy was reasonable as to food items sold in Hempfield's "K mart Foods" concessions. Both policies were valid and ancillary to the purpose of license agreement.

Hempfield nevertheless contends that the competitive pricing policy was unlawful because it interfered with



Hempfield's business judgment on pricing. However, the Zappala affidavit demonstrates that Hempfield did exercise its independent business judgment by agreeing to be part of the K mart enterprise, fully knowing of the policy of competitive retail prices, and, on this basis, voluntarily entering into the contract with Kresge. In any event, how otherwise could a supermarket survive in the marketplace if its prices were not "competitive"? An agreement to charge "competitive" prices is neither sufficiently specific or restrictive to bring it within the ambit of any Sherman § 1 case previously decided.

Furthermore, the agreements on pricing policy were justified as ancillary because Kresge was merely protecting its federally registered service mark by requiring its retail licensee to remain competitive. This provision was no different than the other protective measures concerning maintenance of courteous service, fire prevention, and clean premises.

In the context of Hempfield's agreement to be a K mart Foods licensee, Hempfield did not have unfettered discretion to do as it pleased. Hempfield did not have the right to take Kresge's laboriously established trade name and subvert it to turn a quick profit by overpricing retail goods. This is further corroborated by the Zappala affidavit wherein Zappala, acting for Hempfield's corporate predecessor, agreed that the purpose of the agreement was for the mutual benefit of *both* parties. Since Hempfield took the benefits of the K mart name and reputation, it took the responsibility to protect it. Similarly, since Kresge undertook the burdens of establishing a trade name and then licensing it and leasing space to a food concessioner, Kresge had the *need* and right to protect it from dilution and disreputation.

Petitioner states [petition p. 11] that the Court of Appeals did not specifically discuss this competitive price

policy. However, the Court of Appeals did implicitly affirm the District Court's discussion of it (pp. 75a-76a) by holding that the restraints "serve a legitimate business purpose".

Accordingly, both courts below were correct in concluding that the Kresge pricing policies were reasonable.

Kresge licensed Hempfield to operate a K mart food supermarket. Hempfield could carry any and all food goods. The non-food inventory to be carried by Hempfield was described in the two License Agreements. Hempfield claims the limitation was *per se* illegal.

As with the other provisions, this limitation on non-food items was a valid ancillary part of the License Agreements. The District Court's opinion of February 27, 1974, refused to allow an amendment to the complaint (three years after the case had started) on this issue, which was not pleaded initially. That opinion correctly recognized that it was a "minor" issue.

Petitioner cites *United States v. Topco Associates*, 405 U. S. 596 (1972). That case involved territorial restrictions, and has nothing whatsoever to do with the present case. There is no case which has held, in the context of a de facto partnership, or a "concession", that limitations on the extent of inventory are *per se* illegal. Kresge never limited Hempfield's choice of supply, or the brands it could carry, or the price it paid for its merchandise. It would be absurd for Kresge to license another entity which could then sell all the same goods as Kresge.

### C. There Was No Basis to the Record to Declare the License Agreement Provisions Per Se Illegal.

The Court of Appeals carefully considered Hempfield's claims that the Kresge license provisions complained of were *per se* illegal. The lower court emphasized the



unique nature of the Kresge-Hempfield relationship. Hempfield's petition ignores the prior decisions of this Court, relied on below, which hold, "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 607-8 (1972). In the absence of such experience, the Court will not classify unique business relationships as *per se* violations. *White Motor Co. v. United States*, 372 U. S. 253 (1963).

The Court of Appeals held, in the context of the overall arrangement, that the restraints complained of "serve a legitimate business purpose . . . [and] are not illegal *per se*" (p. 18a).

In the present case, the facts set forth above demonstrate a unique "joint venture-concession" situation which defies classification, for it has elements of a franchise and a concession as well as a *de facto* partnership. As already demonstrated, both courts below recognized this, and held there was not sufficient experience with this type of arrange to classify it as a *per se* violation of the Sherman Act.

### D. This Court Should Not Review This Case Because the Limited Restraints Agreed to by Kresge and Hempfield Are Lawful Under the Ancillary Restraints Doctrine.

The Court of Appeals held the complained of restraints were "incidental" to the business relationship. The District Court applied the doctrine of ancillary restraints as set forth in *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 178 (S. D. N. Y. 1960), which permits, as reasonable, a restraint which:

> (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary;

(2) does not unreasonably affect competition in the market place; and

(3) is not imposed by a party or parties with monopoly power.

As detailed below, the agreements under review meet all the above tests.

**1. The Ancillary Restraints Are Reasonably Necessary to the Legitimate Primary Purpose of the Arrangement.**

Kresge licensed its trade name "K mart" and had a need and a *right* to exercise quality control over the licensee of the trade mark. *Denison Mattress Factory v. Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959). Furthermore, Kresge had a *duty* to do so. Failure to comply with this duty can result in legal abandonment of the federally registered mark. *Dawn Donut Co., supra; E. I. duPont deNemours & Co. v. Celanese Corp. of America*, 167 F. 2d 487 (Ct. of Cust. and Pat. Appeals 1948).

The disputed clauses in the K mart License Agreements were within this right and duty. They were reasonably necessary to the legitimate primary purpose of this licensing arrangement. Cooperation and business success could only be fostered if there was intra-store coordination between Kresge and Hempfield. Therefore, they had to charge the same prices for the few non-food identical items, had to have the same general policy of competitive pricing and operations, and had to present a common front to the public as to the limited items sold in common with each other. In effect, the clauses were similar to a limited covenant not to compete, and such covenants are reasonable and lawful. *Savon Gas Stations No. Six v. Shell Oil Co.*, 309 F. 2d 306 (4th Cir. 1962) cert. denied 372 U. S. 911 (1962), *Syntex Laboratories, Inc. v. Norwich Pharmacal Co.*, 1970 CCH Trade Cases ¶ 73,372 (S. D. N. Y. 1970). See also *People ex rel. Scott v. Convenience Food Mart, Inc., supra.*



For these reasons, the restraints in this case were reasonably necessary to the legitimate primary purpose of the arrangement, which was to maintain quality control in the use of Kresge's trademark "K mart".

**2. The Restraints Do Not Unreasonably or Unfavorably Affect Competition in the Market Place, But Were in Aid of Competition.**

There was no dispute that there were many other stores in the eastern suburbs of Pittsburgh selling the same items sold by Kresge and Hempfield. Kresge did not affect these stores in any way whatsoever, nor did Kresge restrict or dictate Hempfield's sources of supply or the prices Hempfield paid for its merchandise.

Furthermore, the materials attached to the James Stangl Affidavit (filed in support of Kresge's motion) established beyond doubt that Hempfield had a miniscule part of the overall local market of retail food stores. Accordingly, Kresge's policies could not have had any unreasonable effect on competition in the market place. Indeed, an insistence on "competitive" prices is beneficial to the consuming public.

**3. The Restraints Have Not Been Imposed by a Party With Monopoly Power.**

It is also beyond dispute, not only that Hempfield had a very small part of the food supermarket business in its marketing area, but also that Kresge had many competitors which sold the same items. Hempfield does not contend that Kresge had monopoly power in its market.

Therefore, Kresge has met all three criteria of the ancillary restraints doctrine as announced in *United States v. Columbia Pictures Corp., supra,* and, the District Court was correct in holding that the ancillary restraints doctrine is applicable to this case.

**E. The Lower Courts Did Not Err in Ruling on the Scope of Discovery.**

Hempfield's last issue (pp. 15-17) is that the scope of its pretrial discovery was erroneously limited by the District Court. Hempfield had sought information concerning all other K mart food stores licensed by Kresge, and the licensing arrangements with other stores. The District Court correctly ruled that these other stores and arrangements were irrelevant; it was only the Kresge-Hempfield relationship which is relevant.

Hempfield never alleged that Kresge attempted to control an entire market, or engaged in any activity beyond allegedly interfering with the retail sales practices of Hempfield's stores. Therefore, Kresge's other licensing arrangements are outside the scope of the allegations against Kresge, and hence irrelevant.

Rule 26 of the Federal Rules of Civil Procedure only permits discovery of relevant material. Since the material requested by appellant was not relevant, the District Judge was correct in refusing those requests.

On review, the Court of Appeals correctly noted that the sought-after discovery was strictly for jurisdictional purposes (purportedly, to show that because Kresge's policies vis-a-vis Hempfield were applied on a nationwide basis, they affected interstate commerce), and therefore that issue was mooted by its decision that subject matter jurisdiction existed in this case (p. 24a).

However, in its final argument in its petition to this court, Hempfield tries to imply that the case should have



been remanded for further discovery on the rule of reason and the commercial impact of the K mart License Agreement provisions (pp. 16-17). This is a blatant attempt by Hempfield to create an issue that did not exist in the courts below, because Hempfield only wanted further discovery for purposes of proving subject matter jurisdiction, not for purposes of proof on the rule of reason.

Hempfield has always argued that this case involves *per se* violations of the antitrust laws, and Hempfield never made any argument that the rule of reason was involved in this case. (See p. 75a.) This was the basis for its Motion for Partial Summary Judgment. Nonetheless, the Court of Appeals addressed this issue, and found that Hempfield had failed to show an unreasonable restraint on trade. The sought-after discovery would not make any difference in the Court of Appeals treatment of this issue.

One final point is of considerable significance in view of this Court's recent decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 45 U. S. L. W. 4138 (1/25/77).

Hempfield attempted to expand the scope of discovery in order to inquire into the practices of the Kresge Company nationwide, and particularly into transactions of all K mart stores. Hempfield fails in its present petition, as it did in the two lower courts, to establish that it had any standing to raise or litigate issues that did not and could not cause damage to its own "business or property." In *Brunswick Corp., supra,* this court reaffirmed the antitrust requirement that plaintiff is entitled to sue only for damages to *its* "business or property." Accordingly, the scope of the petitioner's pretrial discovery was correctly limited to the relevant issues in this case.

## CONCLUSION.

Respondent S. S. Kresge Company prays that the Petition for Writ of Certiorari Be Denied.

Respectfully submitted,

HENRY T. REATH,
MICHAEL M. BAYLSON,
RICHARD M. ABRAMS,
DUANE, MORRIS & HECKSCHER,
*Attorneys for Respondent.*

JAMES C. TUTTLE,

ANDREW L. WEIL, JR.,
CLELAND, HURTT, WITT AND WEIL,
*Of Counsel.*